

In the Matter of

Rules and Regulations Implementing
the
Telephone Consumer Protection Act
of 1991

Junk Fax Prevention Act of 2005

Docket No. 05-338

COMMENT OF JIMMY A. SUTTON ON
NOTICE OF PROPOSED RULEMAKING AND ORDER

I would like to comment on Docket No. 05-338, in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 and the Junk Fax Protection Act of 2005.

My comments are as a small business owner, a real estate broker (California), a general contractor (California), and a consumer.

Before addressing specific questions posed by the proposed rulemaking, I wish to set the background, as I perceive it, both as a consumer and a small business owner.

Historically, I have received about 1,000 unwanted and unsolicited advertising faxes per year. Those faxes to my personal fax machine may

arrive at 3:00 AM, awakening my spouse and myself from sleep. Each such fax involves trespass and conversion of my private property to the use of the advertiser. I do not want to receive these faxes unless I give express permission. Additionally, these junk faxes prevent me from communicating with or receiving orders from my customers.

In its short life, the JFPA of 2005 has already made the situation MUCH worse, and junk faxers are only beginning to figure out how to exploit the JFPA. For example, I have had a junk faxer argue in court that the act of calling to find out who sent faxes, with no identification of the sender or sender's fax number, established an EBR—and, therefore, the next 119 unsolicited faxes sent to me by this mortgage broker/banker were legal. In this case, the court held that these faxes happened before the passage of the JFPA, so the junk-faxer's arguments were thwarted by the fact that the JFPA is not retroactive. Who knows what will happen next time. I'm also aware of a TCPA violator who has successfully argued in court that the fact that they sell loans to a specific bank means that they have an EBR exemption with every customer of that bank.

I have had to remove my fax numbers from my company web sites—in fact, I took my company web sites down entirely—because it appears the JFPA may make it impossible to prevent junk faxes if an entity has its fax number on its

web site. Unless rules are carefully crafted, this will be a true “job killer” and will impact business that wish to make it easy for customers to place orders.

It appears to me that this rulemaking is critical to preserve any vestige of protection of consumer and business privacy and protection from theft.

The following are specific comments re the proposed rulemaking:

1. [Referencing item 10 in FCC 05-206] Providing a facsimile number within the context of an EBR should be strictly construed as it is written—specifically, the entity providing the fax number should be providing the fax number specifically for the purpose of requesting that the faxer send some material or transaction via fax. There must be a way for an entity to place a fax number on its own web site with a statement such as, “Only Orders or Product Inquiries may be sent to this fax number,” which would ***not*** grant permission for their telecom carrier to start faxing them ads for Cancun Vacations, home refinancing, or enlargement of sundry body parts.
2. As suggested by the point above, the rules should clarify that unsolicited faxes should only be allowed for products or services expected in the context of the EBR—I don’t want my local utility to fax me ads for auto insurance, the local deli, or janitorial services.

3. [Ref. 10] Responsibility *must* lie with the sender to establish that the recipient has agreed to make the number publicly available, both because it is virtually impossible for the recipient to prove the converse (how do I prove I never made my number available?) and because to place the burden on the recipient would invite junk faxers to fax first and then go hunting for an EBR if sued.
4. [Ref 11] The sender *must* bear the burden of proving the existence of an EBR and possession of the recipient's fax number prior to July 9, 2005. If the recipient were to bear that burden, all junk faxers would simply claim to have had an EBR and the fax number prior to July 9, 2005, and it would be impossible for the recipient to prove the negative. The de facto result would be to remove the entire prohibition on junk faxing from the TCPA. If an EBR exists, then the sender should be able to demonstrate how and when the EBR came into existence. If the sender got the recipient's fax number prior to July 9, 2005, then the sender should have some record of how that fax number was acquired.
5. [Ref 13] It is important for the Commission to recognize that the JFPA places new overly burdensome costs on the recipients of junk faxes legalized by the JFPA's EBR exemption. For example, with the approximately 1,000 junk faxes per year I have historically received, I estimate the new opt-out and record keeping requirements imposed on

recipients (e.g., I must build and populate a database with every opt-out request I make) will take me 5 weeks of full time effort per year (assumes 10 minutes per fax to opt-out and record that action and documentation in a database—50 faxes/per day in 8 hours with short breaks). It is entirely reasonable to assume the JFPA will increase the historic number of junk faxes by a factor of 2-10. So, when the FCC and staff consider whether it would be unduly burdensome to track the time frame of EBRs, the FCC and staff should also consider the fact that it would clearly be unduly burdensome to businesses and consumers who are recipients of such faxes to ***not*** have such a limit.

6. [Ref 14] The rules should specify “directionality” to the establishment of an EBR. For example, I live in California. I have observed that I can find thousands of fax numbers owned by the State of California on the web—often, it is the only way the public can reach some agencies. If I wished to enter the junk faxing business, if there is no directionality required by the rules, I would call up the Dept. of Motor Vehicles and have a two-way, voluntary conversation requesting a driver’s handbook. Unless the FCC’s rules are carefully crafted, the unscrupulous junk faxer would now have an EBR exemption with every fax machine owned by the State of California (at least, with those on the web)—including the State Universities, teaching hospitals, etc. Now, because there is no apparent limit on the content

of unsolicited faxes sent under the EBR exemption, the unscrupulous junk faxer has created a valuable business model—it is able to broadcast unlimited faxes for any arbitrary third-party's products (remember those Cancun Vacations?) to thousands of fax machines owned by the state. Certainly, the State could ill-afford to spend the millions of dollars in labor to opt-out (and track the opt-outs) of all these faxes and, therefore, the taxpayers would be forced to absorb the trespass and conversion costs incurred by what would likely be millions of faxes. Thus, the rules should establish clear directionality to the establishment of an EBR such that junk faxers cannot benefit simply by setting up a boiler room to call every business in the U.S. and request something, such as an annual report, and thereby establish an EBR allowing unlimited junk faxing to all of those businesses.

7. [Ref 16 & 17] The 18/3 month limitation on EBRs seems reasonable, given the circumstances and desirability of consistency with other rules. I support the recommendation in this respect.
8. [Ref 18] As stated before, there are significant costs for both consumers and businesses that are recipients of unsolicited faxes associated with failure to place limits on the EBR. These costs include not only the costs of trespass and conversion (e.g., ink, toner, paper, electricity, telephone line, wear-and-tear on fax equipment, etc.), but also include

the costs of lack of use of the consumer's or business' fax machine (e.g., for receiving orders) and the most burdensome cost of actually opting out and maintaining/backing-up/etc. a database documenting opt-out requests. Hence, failing to limit the duration of an EBR exemption would be unduly burdensome to both consumers and businesses.

9. [Ref. 19] The Commission must recognize that the JFPA forces a significant transfer of unwanted costs to the recipients of unsolicited faxes—akin to being forced to pay postage due on junk mail and then forced to pay the cost of opting out and maintaining an opt-out database to avoid receiving future postage due junk mail. Hence, it is unreasonable to be sensitive to the cost burden on the senders of junk faxes without being at least equally sensitive to the cost burden placed on recipients of junk faxes—which include small businesses and consumers. Exempting certain classes of business from the requirement for a cost-free opt-out mechanism will simply transfer those costs and more to small businesses and consumers who are the recipients of such faxes.
10. [Ref. 20] The period to honor an opt-out request should be set to 24 hours. All of the junk faxes I receive (and I really mean 100%) are clearly computer generated, and all of the removal numbers are computer-based Interactive Voice Response (IVR) systems. I was Vice President of Engineering for one of a number of companies in that

arena, and it is common business practice to use IVR systems to update databases (for example, a database of fax numbers) in “real-time” (less than 1 second from the time a removal call was completed). Even the most primitive companies batched updates to happen each night. Thus, 24 hours is a completely reasonable period to honor opt-out requests.

11. [Ref. 21] Simply stated, the identification of junk faxers has historically been a significant problem, with junk faxers going to great lengths to hide their identity (both of the fax broadcasters and the entities ultimately benefiting from the faxes). Whatever interplay exists between these identification requirements, the Commission’s rules should ensure better identification (and larger penalties for identification failure) than is currently required.
12. [Ref. 21] The Commission’s rulemaking should clarify that faxes that are illegal (either because no EBR exists or because the sender is not properly identified) do ***not*** require the recipient to opt-out. First, that burden should not be placed on the recipient for an illegal fax, and, second, since the sender is already in violation of the law, there is every reason to presume the removal mechanism will simply be used to collect more fax numbers and/or to verify where there is a live reader to blast with more illegal faxes.

13. [Ref. 22] As noted previously, the JFPA will place a larger financial burden on the recipients of unsolicited faxes than on the senders. It is completely unreasonable to move even more of that burden to the recipient by requiring the recipient to bear the cost of the removal mechanism/telephone call as well. If the Commission is going to exempt any senders on the basis of being a “small business,” then it ought to exempt recipients from even more burdensome expenses based on being a small business or consumer. Since it is clear that fax blasters don’t make this differentiation in recipients, the senders should always be required to bear all costs of removal.
14. [Ref. 24] The rules should allow a general opt-out mechanism. For example, the Federal Government should be able to terminate an EBR or to stop unwanted faxes from a sender without being forced to have 1,000 employees key every fax number subscribed by the Federal Government into an IVR system. Also, there must be a mechanism to specify that, while I wish to continue to buy products from you, I do not want to receive any unsolicited faxes from you.
15. [Ref. 30] The facsimile sender should bear the burden of proof to demonstrate that it had the consumer’s prior express invitation or permission. The converse would make no sense, since it largely would be impossible for the recipient to prove that he/she/it had not given

such permission. If the burden of proof were placed on the recipient to prove he had never given such permission, the effect would be to completely eviscerate the junk fax protections of the TCPA. If Wal-Mart sends me a fax, how do I prove I never gave it permission to do so?

16. The Commission's rules should clearly limit EBRs with intermediaries.

For example, it is common practice for mortgage brokers wishing to send unsolicited faxes to buy faxing and resultant leads from a fax blaster. Often, the fax blaster operates the call center doing initial screening on incoming calls resulting from junk faxes. My experience is that such call centers give false and misleading names, false addresses, and other false information. However, should I call on a mortgage fax and have my call initially screened by the fax blaster's call center, I don't want an EBR to have been formed with the fax blaster—thereby allowing the fax blaster to “legally” inundate me with faxes from all their present and future clients.

17. The rules should answer the question of what is the relationship

between an EBR and the EBR exemption. For example, if I send a letter to a real estate company stating, “I hereby terminate any and all existing business relationships with <company>”, I would think that should terminate their right to send me faxes to any number. And, since that company would presumably have to know which fax

numbers are associated with an entity in an EBR (otherwise, it could scarcely be said to be sending the advertisement to someone with whom it knew it had an EBR), it should be a trivial matter for the sender to determine which fax numbers are associated with a particular entity (recipient).

18. The rules should carefully specify what constitutes making one's fax number public. For example, the registrar with which my web domains are registered requests a fax number with each registration which is, in turn, made available if anyone does a "whois" on a domain name of mine. I certainly did not give my fax numbers with the intent of inviting inundation with junk faxes from those claiming an EBR. The rules should make clear that this requirement is only met when one's number is provided to a directory specifically intended to provide public access to such fax numbers.
19. The Commission should narrowly limit the extent of an EBR and should make the extent of the opt-out request match the extent of the EBR. For example, if I give my fax number to a particular real estate agent, requesting information only about a specific property, I would expect the EBR to be limited only to that agent (not to other agents in the office, other offices in the state, or other offices across the U.S.). In fact, I would hope that the EBR extended only to the specific agent and specific property about which information was requested. Whatever

“breadth” the Commission gives to an EBR, an opt-out request must cover the same breadth. No fair saying that speaking with one agent about one property creates an EBR with everyone in that real estate company but then, in some manner, limiting opt-out requests more narrowly (say, only to the agent in another state that junk faxed me).

I would encourage the Commission to carefully consider these comments so as to preserve some measure of protection against the barrage of unwanted junk faxes that will increasingly invade our homes and businesses (small and large) as a result of the JFPA of 2005. The senders of such faxes must be held responsible for proof of claimed EBRs, possession of fax numbers prior to July 9, 2000, and sourcing of fax numbers from public directories. To do otherwise, wherein the recipient would find it difficult or impossible to prove the negative of those facts, would effectively eliminate all junk fax protections under the TCPA. Similarly, junk faxes already improperly transfer the entire cost of advertising (printing press, ink, and paper) to the recipient; it would be even more egregious to transfer the cost of opting-out to recipients for ANY size business.

Finally, the Commission should give full consideration to the fact that the JFPA places an increased and onerous expense burden on fax recipients to opt-out of such faxes and to maintain the database necessary to track and

document such opt-out requests. There are many more receiving entities than sending entities for such faxes, so the cost burden placed on recipients of opting-out and maintaining databases will far, far exceed any costs incurred by senders in tracking EBR time limits or similar data. The recipients of such faxes are also small businesses (and consumers and big businesses). If a small business sender wishes to trespass and convert the recipient's resources to the sender's use, they should bear all other costs (e.g., toll-free removal) associated with the unsolicited faxes.

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